

AMENDED IN ASSEMBLY APRIL 16, 2012

AMENDED IN ASSEMBLY APRIL 9, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 2045

Introduced by Assembly Member Perea

February 23, 2012

An act to add Chapter 4.5 (commencing with Section 13996) to Part 4.7 of Division 3 of Title 2 of the Government Code, relating to economic development.

LEGISLATIVE COUNSEL'S DIGEST

AB 2045, as amended, Perea. Emerging technology and biotechnology company: income taxes: net operating losses: transfers.

The Personal Income Tax Law and Corporation Tax Law impose taxes measured by income, and allow individual and corporate taxpayers to utilize net operating losses as carryovers and carrybacks of those losses for purposes of offsetting their individual and corporate tax liabilities.

This bill would require the ~~Department of _____~~ *Treasurer*, in cooperation with the Franchise Tax Board, to establish a corporation business tax benefit certificate transfer program to allow a new or expanding emerging technology and biotechnology company in this state with unused net operating losses to surrender those net operating losses for use by a taxpayer subject to the Corporation Tax Law in this state in exchange for private financial assistance to be provided by that taxpayer to assist in the funding of costs incurred by the new or expanding emerging technology and biotechnology company, as provided.

This bill would provide that any net operating losses that are transferred pursuant to a corporation business tax benefit transfer certificate issued to a taxpayer is allowed beginning on or after the first day of the 4th taxable year after the date of issue of that certificate.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Chapter 4.5 (commencing with Section 13996)
2 is added to Part 4.7 of Division 3 of Title 2 of the Government
3 Code, to read:

4
5 CHAPTER 4.5. EMERGING TECHNOLOGY AND BIOTECHNOLOGY
6 COMPANIES TAX LOSS TRANSFER PROGRAM
7

8 13996. (a) ~~The Department of~~ Treasurer, in cooperation
9 with the Franchise Tax Board, shall establish a corporation business
10 tax benefit certificate transfer program to allow new or expanding
11 emerging technology and biotechnology companies in this state
12 with unused net operating losses, as described in Section 17276.20
13 or Section 24416.20 of the Revenue and Taxation Code, to
14 surrender those net operating losses for use by other taxpayers in
15 this state.

16 (b) The tax benefits of those net operating losses may be used
17 on a tax return required to be filed pursuant to Part 10.2
18 (commencing with Section 18401) of Division 2 of the Revenue
19 and Taxation Code by a taxpayer subject to the Corporation Tax
20 Law (Part 11 (commencing with Section 23001) of Division 2 of
21 the Revenue and Taxation Code) in exchange for private financial
22 assistance to be provided by the taxpayer that is the recipient of
23 the corporation business tax benefit certificate to assist in the
24 funding of costs incurred by the new or expanding emerging
25 technology and biotechnology company.

26 (c) (1) ~~The department~~ Treasurer, in cooperation with the
27 Franchise Tax Board, shall review and approve applications by
28 new or expanding emerging technology and biotechnology
29 companies in this state with unused but otherwise allowable net
30 operating losses to surrender those net operating losses in exchange
31 for private financial assistance to be made by the taxpayer that is

1 the recipient of the corporation business tax benefit certificate in
2 an amount equal to at least 80 percent of the amount of the
3 surrendered tax net operating losses.

4 (2) For purposes of this section, “amount of surrendered net
5 operating losses” means the amount of the net operating loss
6 multiplied by the new or expanding emerging technology or
7 biotechnology company’s anticipated apportionment factor, as
8 determined pursuant to Section 25128 or Section 25128.5 of the
9 Revenue and Taxation Code, for the taxable year in which the net
10 operating loss is transferred and subsequently multiplied by the
11 rate of tax imposed by Section 23151 or Section 23501 of the
12 Revenue and Taxation Code.

13 (d) The ~~department~~ *Treasurer* shall not approve the transfer of
14 more than sixty million dollars (\$60,000,000) of transferable net
15 operating losses in a fiscal year. If the total amount of transferable
16 net operating losses requested to be surrendered by approved
17 applicants exceeds sixty million dollars (\$60,000,000) in a fiscal
18 year, the ~~department~~ *Treasurer*, in cooperation with the Franchise
19 Tax Board, shall allocate the transfer of surrendered net operating
20 losses as follows:

21 (1) An eligible applicant with two hundred fifty thousand dollars
22 (\$250,000) or less of transferable net operating losses shall be
23 authorized to surrender the entire amount of its transferable net
24 operating losses.

25 (2) An eligible applicant with more than two hundred fifty
26 thousand dollars (\$250,000) of transferable net operating losses
27 shall be authorized to surrender a minimum of two hundred fifty
28 thousand dollars (\$250,000) of its transferable net operating losses.

29 (3) An eligible applicant with more than two hundred fifty
30 thousand dollars (\$250,000) of transferable net operating losses
31 shall be authorized to surrender additional transferable net
32 operating losses determined by multiplying the applicant’s
33 transferable net operating losses less the minimum transferable
34 net operating losses that company is authorized to surrender under
35 paragraph (2) by a fraction, the numerator of which is the total
36 amount of transferable net operating losses that the department is
37 authorized to approve less the total amount of transferable tax
38 benefit approved under paragraphs (1) and (2), and the denominator
39 of which is the total amount of transferable net operating losses
40 requested to be surrendered by all eligible applicants less the total

1 amount of transferable net operating losses approved under
2 paragraphs (1) and (2).

3 (e) If the total amount of transferable net operating losses that
4 would be authorized using the method in subdivision (d) exceeds
5 sixty million dollars (\$60,000,000) in a fiscal year, then the
6 ~~department~~ *Treasurer*, in cooperation with the Franchise Tax
7 Board, shall limit the total amount of net operating losses
8 authorized to be transferred to sixty million dollars (\$60,000,000)
9 by applying the method in subdivision (d) on an apportioned basis.

10 (f) For purposes of this section, “transferable tax benefits”
11 include an eligible applicant’s unused but otherwise allowable net
12 operating losses multiplied by the applicant’s anticipated
13 apportionment factor as determined pursuant to Section 25128 or
14 Section 25128.5 of the Revenue and Taxation Code for the taxable
15 year in which the net operating loss is transferred and subsequently
16 multiplied by the tax imposed by Section 23151 or Section 23501
17 of the Revenue and Taxation Code. An eligible applicant’s
18 transferable net operating losses shall be limited to net operating
19 losses that the applicant requests to surrender in its application to
20 the department and shall not, in total, exceed the maximum amount
21 of net operating losses that the applicant is eligible to surrender.

22 13996.1. No application for a corporation business tax benefit
23 transfer certificate shall be approved for a new or expanding
24 emerging technology or biotechnology company that meets either
25 of the following:

26 (a) Has demonstrated positive net operating income in any of
27 the two previous full years of ongoing operations as determined
28 on its financial statements issued according to generally accepted
29 accounting standards endorsed by the Financial Accounting
30 Standards Board.

31 (b) Is directly or indirectly at least 50 percent owned or
32 controlled by another corporation that has demonstrated positive
33 net operating income in any of the two previous full years of
34 ongoing operations as determined on its financial statements issued
35 according to generally accepted accounting standards endorsed by
36 the Financial Accounting Standards Board or is part of a
37 consolidated group of affiliated corporations, as filed for federal
38 income tax purposes, that in the aggregate has demonstrated
39 positive net operating income in any of the two previous full years
40 of ongoing operations as determined on its combined financial

1 statements issued according to generally accepted accounting
2 standards endorsed by the Financial Accounting Standards Board.

3 13996.2. (a) The maximum lifetime value of surrendered net
4 operating losses that a corporation shall be permitted to surrender
5 pursuant to this chapter is fifteen million dollars (\$15,000,000).

6 (b) Applications must be received on or before June 30 of each
7 fiscal year.

8 13996.3. The ~~department~~ *Treasurer*, in consultation with the
9 Franchise Tax Board, shall establish rules for the recapture of all,
10 or a portion of, the amount of a grant of a corporation business tax
11 benefit certificate from the new or expanding emerging technology
12 and biotechnology company having surrendered tax benefits
13 pursuant to this chapter in the event the company fails to use the
14 private financial assistance received for the surrender of tax benefits
15 as required by this chapter or fails to maintain a headquarters or a
16 base of operation in this state during the five years following
17 receipt of the private financial assistance; except if the failure to
18 maintain a headquarters or a base of operation in this state is due
19 to the liquidation of the new or expanding emerging technology
20 and biotechnology company.

21 13996.4. (a) The ~~department~~ *Treasurer*, in cooperation with
22 the Franchise Tax Board, shall review and approve applications
23 by taxpayers subject to the Corporation Tax Law (Part 11
24 (commencing with Section 23001) of Division 2 of the Revenue
25 and Taxation Code) to acquire surrendered tax net operating losses
26 approved pursuant to this chapter, which shall be issued in the
27 form of corporation business tax benefit transfer certificates, in
28 exchange for private financial assistance to be made by the taxpayer
29 in an amount equal to at least 80 percent of the amount of the
30 surrendered net operating loss of an emerging technology or
31 biotechnology company in the state.

32 (b) A corporation business tax benefit transfer certificate shall
33 not be issued unless the applicant certifies that as of the date of
34 the exchange of the corporation business tax benefit certificate it
35 is operating as a new or expanding emerging technology or
36 biotechnology company and has no current intention to cease
37 operating as a new or expanding emerging technology or
38 biotechnology company.

39 (c) The private financial assistance shall assist in funding
40 expenses incurred in connection with the operation of the new or

1 expanding emerging technology or biotechnology company in the
 2 state, including, but not limited to, the expenses of fixed assets,
 3 such as the construction and acquisition and development of real
 4 estate, materials, startup, tenant fitout, working capital, salaries,
 5 research and development expenditures, and any other similar
 6 expenses.

7 (d) ~~The department~~ *Treasurer* shall require a taxpayer that
 8 acquires a corporation business tax benefit certificate to enter into
 9 a written agreement with the new or expanding emerging
 10 technology or biotechnology company concerning the terms and
 11 conditions of the private financial assistance made in exchange
 12 for the certificate. The written agreement may contain terms
 13 concerning the maintenance by the new or expanding emerging
 14 technology or biotechnology company of a headquarters or a base
 15 of operation in this state.

16 13996.5. (a) Any net operating losses that are transferred
 17 pursuant to a corporation business tax benefit transfer certificate
 18 issued to a taxpayer under this chapter shall only be allowed
 19 beginning on or after the first day of the fourth taxable year after
 20 the date of issue of that certificate.

21 (b) *Any net operating losses that are transferred and have*
 22 *reached the first day of the fourth taxable year after the date of*
 23 *issue of that certificate can only be used if the company that*
 24 *transferred the net operating losses is still in business or has been*
 25 *acquired. If the company is no longer in business or has not been*
 26 *acquired by another company, the net operating loss that was*
 27 *transferred no longer has any value.*

28 13996.6. For purposes of this chapter:

29 (a) “Biotechnology” means the continually expanding body of
 30 fundamental knowledge about the functioning of biological systems
 31 from the macro level to the molecular and subatomic levels, as
 32 well as novel products, services, technologies, and subtechnologies
 33 developed as a result of insights gained from research advances
 34 that add to that body of fundamental knowledge.

35 (b) “Biotechnology company” means an emerging corporation
 36 that has its headquarters or base of operations in this state; that
 37 owns, has filed for, or has a valid license to use protected,
 38 proprietary intellectual property; and that is engaged in the
 39 research, development, production, or provision of biotechnology
 40 for the purpose of developing or providing products or processes

1 for specific commercial or public purposes, including, but not
2 limited to, medical, pharmaceutical, nutritional, and other
3 health-related purposes, agricultural purposes, and environmental
4 purposes, or a person whose headquarters or base of operations is
5 located in this state, engaged in providing services or products
6 necessary for such research, development, production, or provision.

7 (c) “Full-time employee” means a person employed by a new
8 or expanding emerging technology or biotechnology company for
9 consideration for at least 35 hours a week, or who renders any
10 other standard of service generally accepted by custom or practice
11 as full-time employment and whose wages are subject to
12 withholding as required by Division 6 (commencing with Section
13 13000) of the Unemployment Insurance Code, or who is a partner
14 of a new or expanding emerging technology or biotechnology
15 company who works for the partnership other than as an employee
16 for at least 35 hours a week, or who renders any other standard of
17 service generally accepted by custom or practice as full-time
18 employment, and whose distributive share of income, gain, loss,
19 or deduction, or whose guaranteed payments, or any combination
20 thereof, is subject to the payment of estimated taxes, as required
21 under the Revenue and Taxation Code. To qualify as a “full-time
22 employee,” an employee shall also receive from the new or
23 expanding emerging technology or biotechnology company health
24 benefits under a group health plan, a health benefits plan, or a
25 policy or contract of health insurance covering more than one
26 person issued pursuant to the Insurance Code. “Full-time
27 employee” shall not include any person who works as an
28 independent contractor or on a consulting basis for the new or
29 expanding emerging technology or biotechnology company.

30 (d) “Group health plan” means an employee welfare benefit
31 plan, as defined in Title 1 of Section 3 of the Employee Retirement
32 Income Security Act of 1974 (Public Law 93-406; 29 U.S.C.
33 Sec.1002(1)), to the extent that the plan provides medical care and
34 including items and services paid for as medical care to employees
35 or their dependents, as defined under the terms of the plan, directly
36 or through insurance, reimbursement or otherwise.

37 (e) “New or expanding” means a technology or biotechnology
38 company that at the end of the calendar year prior to the year in
39 which the company files an application for surrender of unused
40 but otherwise allowable tax benefits, on the date on which the

1 application is submitted, and on the date on which the company
2 receives the corporation business tax benefit certificate, has fewer
3 than 225 employees in the United States, that has at least one
4 full-time employee working in this state if the company has been
5 incorporated for less than three years, that has at least five full-time
6 employees working in this state if the company has been
7 incorporated for more than three years but less than five years, and
8 that has at least 10 full-time employees working in this state if the
9 company has been incorporated for more than five years.

10 (f) “Technology company” means an emerging corporation that
11 has its headquarters or base of operations in this state; that owns,
12 has filed for, or has a valid license to use protected, proprietary
13 intellectual property; and that employs some combination of the
14 following: highly educated or trained managers and workers, or
15 both, employed in this state who use sophisticated scientific
16 research service or production equipment, processes or knowledge
17 to discover, develop, test, transfer, or manufacture a product or
18 service.